UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania, CTW, CLC	Cases 06-CA-102465, 06-CA-102494, 06-CA-102516, 06-CA-102518, 06-CA-102525, 06-CA-102534, 06-CA-102540, 06-CA-102542, 06-CA-102544, 06-CA-102555, 06-CA-102559, 06-CA-102566, 06-CA-104090, 06-CA-104104, 06-CA-106636, 06-CA-107127, 06-CA-107431, 06-CA-107532, 06-CA-108547, 06-CA-111578, 06-CA-115826

CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO EXCEPTIONS FILED BY RESPONDENT UPMC

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CHARGING PARTY'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENT UPMC's EXCEPTIONS

This Brief is submitted by the Charging Party, SEIU Healthcare Pennsylvania ("Union") in Opposition to the Exceptions filed by Respondent UPMC. The Union further adopts and incorporates by reference the arguments made in the General Counsel's Answering Brief in Opposition to Respondent UPMC's Exceptions.

INTRODUCTION

At the outset, it should be noted that the only issue involving Respondent UPMC is whether it constitutes a single employer and/or single integrated enterprise with UPMC Presbyterian Shadyside within the meaning of the Act. [Complaint ¶¶2(a), 3, 4(a), (b), and 5].[1] After the issuance of the amended complaint on January 9, 2014, UPMC filed a motion to dismiss the single employer allegations[2] with the Board. On February 7, 2014, the Board denied the motion, ordering that:

> The Respondents' Motion to Dismiss Amendments to the consolidated complaint is denied. The Respondents have failed to establish that the amendments are improper and that they are entitled to judgment as a matter of law.

[February 7, 2014 Order of the Board].

Since the Board's ruling, no new evidence has been presented on this issue, and there has been no substantive ruling by the ALJ. Consequently, UPMC's Exceptions are not properly before the Board.

[1] For purposes of this Answering brief, "Complaint" refers to the Amended Complaint issued by the General Counsel on January 9, 2014.

[2] For convenience, the Union refers to these allegations by the shorthand phrase, "single employer."

PROCEDURAL POSTURE

The trial of this action commenced on February 12, 2014. The ALJ agreed to permit the parties to try the issues separately, first litigating the substantive unfair labor practice allegations against UPMC Presbyterian Shadyside and reserving the single employer issue for a subsequent hearing. [ALJD 2:13-21].[3] Prior to trial, the General Counsel and the Charging Party served separate subpoenas *duces tecum* on UPMC and UPMC Presbyterian Shadyside concerning the single employer issue. Respondent filed petitions to revoke and on February 24, 2014, the ALJ partially denied the petitions. [Tr. 913:11 – 914:18]. Respondent refused to obey the ALJ's order and, as will be discussed *infra*, enforcement proceedings are now pending in the Third Circuit Court of Appeals.[4]

On April 3, 2014, the ALJ formally severed the single employer allegations from the unfair labor practice allegations involving UPMC Presbyterian Shadyside, reasoning that "in light of the ongoing subpoena enforcement proceedings in the district court, there was substantial uncertainty as to when the single employer allegations would proceed to trial." [ALJD 2: 33 – 3:3]. As a result, no evidence on the merits of the single employer allegations has yet been heard by the ALJ.

ARGUMENT

I. Respondent's Exception concerning the ALJ's ruling on the Motion to Reconsider the Motion to Dismiss must be denied. (Exception 1).

Respondent contends that the ALJ erred in denying its motion seeking reconsideration of its January 2014 motion to dismiss filed with the Board. [Resp. Brf. at 2-4]. UPMC repeats its arguments here that the General Counsel improperly issued an amended complaint on January 9,

[3] "ALJD" refers to the Decision of Administrative Law Judge Mark Carissimi issued on November 14, 2014.

[4] *NLRB v. UPMC Presbyterian Shadyside*, Case No. 14-4523 (3rd Cir.).

2014, adding UPMC as a party and asserting that it constituted a single employer with Respondent Presbyterian Shadyside. UPMC further argues the amendments were untimely and violated its due process rights. [*Id*.]. The identical arguments were made in its motion to dismiss, which were rejected by the Board on February 7, 2014.

At the close of evidence on the merits trial, Respondent moved for reconsideration of its motion to dismiss. [Tr. 3133:11-13]. The ALJ denied the motion:

> I'm going to deny that because the Board denied it, and they're the superior authority, so I'm going to have to deny that motion. And as I said, I have severed the single employer aspect of this case, and we will await the subpoena enforcement matter before we proceed to litigation of the single employer issue.

Tr. 3133:14-19.

The Board's 2014 ruling on the motion was correct and should not be reconsidered. Significantly, this was not the first time the Board considered whether UPMC and Presbyterian Shadyside might be a single employer. The same single employer allegations were originally raised during the earlier *UPMC I* litigation between the same parties in 2012-2013.[5] On January 28, 2013, in *UPMC I*, the Board denied UPMC's motion for summary judgment on the same single employer allegations, based in part on the sworn declaration of a UPMC official. The Board ruled that Respondent "failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." *Id*.

Shortly thereafter in *UPMC I*, certain facts which could support the single employer relationship between UPMC and Presbyterian Shadyside were stipulated to on February 2013. Since the Board previously found that the *UPMC I* single employer allegations were sufficient to

[5] This case is the second of two pending, consolidated cases encompassing multiple charges and allegations against both UPMC and Presbyterian Shadyside as a single employer. For convenience, the Union refers to the current consolidated cases by the shorthand term, "UPMC II," and uses "UPMC I" to designate the earlier round of ULP litigation (Case Nos. 06-CA-081896 et al.). Most of the *UPMC I* litigation was resolved by Settlement Agreement in February 2013; the remaining portion of that case was fully litigated and is currently pending before the Board on appeals from the April 19, 2013 Decision and Order of ALJ Goldman (JD-28-13).

support a trial on the merits, there is no cognizable basis for dismissing those allegations now. In any event, UPMC cannot claim to have been unfairly surprised or prejudiced by the inclusion of the single employer allegations in the amended complaint in the instant case, since the General Counsel's allegations here rest on the same core facts and legal doctrine that were litigated in *UPMC I*.

Moreover, there is no merit to UPMC's timeliness argument. Based on the same single employer facts and law underlying *UPMC I* – and consistent with the January 28, 2013 Board Order, the February 2013 stipulations, and the April 2013 ALJ Decision in *UPMC I* – the Union appropriately named and timely served both UPMC and UPMC Presbyterian Shadyside when filing the *UPMC II* charges beginning in April, 2013. In short, both UPMC and Presbyterian Shadyside were on notice at the very outset that the Union's charges in the instant case alleged them to be a single employer. They were also on notice that applicable Board precedent makes out a viable *prima facie* case for treating them as a single employer.

Under these circumstances, Section 10(b) of the Act did not preclude the Regional Director's January 9, 2014 amendment of the complaint to name UPMC as a Respondent and single employer with Presbyterian Shadyside.[6] Indeed, amendment of a complaint seeking to hold an additional entity liable for timely-filed ULP violations is proper under Board law and Section 102.17 of the Board's Rules, even where the additional single employer entity was ***never*** named in any of the underlying ULP charges. Under longstanding Board law, timely service of a charge on any of the entities alleged to constitute a single employer suffices to effect service on

[6] The legal question whether UPMC and UPMC Presbyterian together constitute a single employer, such that a remedy in this case can apply to UPMC, does not depend on UPMC's independent commission of any violations of the NLRA, nor does it hinge on any acts, incidents or conduct that occurred more than six months ago. Rather, single employer status is a function of UPMC's ongoing relationship with UPMC Presbyterian - an entirely lawful relationship that is not itself an Unfair Labor Practice subject to Section 10(b). Amendment of the UPMC II complaint to describe that relationship and its legal status does not implicate Section 10(b)'s purpose to prevent the NLRB from self-initiating prosecution of NLRA violations without the predicate of a properly filed charge.

all components of that single employer. *See, e.g., Hageman Underground Construction,* 253 NLRB 60, 69-70 (1980) (where multiple firms constitute a single employer for purposes of the Act, timely notice and service upon one of them satisfies Section 10(b)'s requirements as to the entity raising a Section 10(b) defense) (citing *Clinch Valley Clinic Hospital*, 213 NLRB 515 (1974), *enf'd* 516 F.2d 996 (4th Cir. 1975); *Barrington Plaza and Tragniew, Inc.,* 185 NLRB 962, 969 (1970), *enfmt. den. in part on other grounds,* 470 F.2d 669 (9th Cir. 1972); *Esgro, Inc.,* 135 NLRB 285, 286 (1962)). *See also G.W. Truck,* 240 NLRB 333, 333 n.1, 334-35 (1979) (cited in *Il Progresso Italo Americano Pub. Co.,* 299 NLRB 270, 270 n.4, 289 (1990)); *Appelbaum Ind.,* 294 NLRB 981, 981 n.1 (1989) (same as to notice of filing deadline for exceptions; service on one of two parties constituting a single employer held binding on the other).

The same logic applies even more forcefully here, where the Union's timely-filed charges named ***both*** entities initially, then were amended, to remove and then reinstate one of the two single employer entities, in response to the Agency's deliberations about how best to proceed.[7]

Accordingly, the Board should deny UPMC's Exception 1.

II. The ALJ properly denied, in part, Respondent's Petitions to Revoke Subpoenas B-720563 and B-720504, relating to the single employer allegations and the issue is now pending in enforcement proceedings in the Third Circuit Court of Appeals (Respondent's Exception 2 and 3).

With regard to the General Counsel's "single employer" subpoena to UPMC, B-720563, the ALJ granted UPMC's petition to revoke Paragraph 35, which he found to be overly broad.

[7] Respondent's reliance on *Ducane Heating Corp.,* 273 NLRB 1389 (1985), is misplaced. [Resp. Bf. at 3-4]. The amended complaint here did not seek to allege new ULPs (or revive dismissed ULPs) arising from any conduct or incidents that took place more than six months before filing and service of the initiating charges. Rather, this complaint continued to assert the same ULP violations that were indisputably timely filed as to the one of the entities constituting a single employer; the only matter added to the pending case was the identity of a related entity that may also be held responsible for those timely charged violations as part of the single employer/single integrated enterprise. *See, e.g., Massey Energy Co.*, 358 NLRB No. 159 (2012) ("holding company" without its own operations or employees may be held accountable for ULPs found).

[Tr. 913:3-15]. The ALJ also revoked substantial parts of the Union's "single employer" subpoena to UPMC, B-720504, including Paragraphs 1-4, 10-11, 17, 19, 20, 21, 26-27, 28, 39, 49-53, 57, 60-65, 67-69, finding these sections to be overly broad. [Tr. 913: 22 -914:12].

Respondent did not file a request for special permission to appeal the ALJ's decision to the Board pursuant to Section 102.26 of the Board's Rules and Regulations and instead, contumaciously refused to comply with the ALJ's order.[8] On March 20, 2014, pursuant to Section 11(2) of the Act, 29 U.S.C. §161(2), the General Counsel filed an application on behalf of the Board to enforce the Union's and General Counsel's subpoenas in the U.S. District Court for the Western District of Pennsylvania in the consolidated case, *NLRB v. UPMC Presbyterian Shadyside*, Case no. 2:14-mc-00109-AJS *et seq*.(W.D. Pa.)[9] The General Counsel did not seek to enforce the portions of the subpoenas that had been revoked by the ALJ.

Respondent opposed the enforcement of the subpoenas in district court, arguing, *inter alia*, burdensomeness and relevance. On August 22, 2014, the district court granted the Board's application to enforce all three subpoenas, amending its order on September 2, 2014, and staying its orders pending appeal. Respondent's Motion for Reconsideration was denied on October 27, 2014. Respondent's appeal to the Third Circuit is pending, *NLRB v. UPMC Presbyterian Shadyside*, No. 14-4523 (3rd Cir.).[10]

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[8] Pursuant to Section 102.31(d), the General Counsel was required to "institute proceedings in the appropriate district court for the enforcement thereof…"Section 102.31(d) of the Board's Rules and Regulations, provides that "Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel ***shall*** in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the Act." (Emphasis added).

[9] Section 11(2) provides in pertinent part that "In case of contumacy or refusal to obey a subpoena, any district court of the United States…within the jurisdiction of which the inquiry is carried on….upon application of the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board …there to produce evidence if so ordered…"

[10] On December 22, 2014, the General Counsel filed a Motion for Summary Affirmance seeking the case to be decided on an expedited basis. The matter has been briefed and a decision is pending.

Given that the statutory and regulatory enforcement scheme has already been invoked by virtue of Respondent's refusal to obey the ALJ's decision, the pending decision by the Third Circuit will have effectively preempted the Board's review of this matter. Indeed, it is unclear whether the Board would have any statutory authority to disobey, overturn or modify the scope of any enforcement decision by the Court of Appeals. An administrative agency is require to implement the "letter and spirit" of an appellate decision. *See e.g., Georgia Pac. Consumer Products, LP v. Von Drehle Corp*., 710 F.3d 527, 536 (4th Cir. 2013); *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 675 F.3d 433, 438 (5th Cir. 2012); *Scott v. Mason Coal Co*., 289 F.3d 263, 267-68 (4th Cir. 2002); *Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977) (agency must follow law of the case).[11]

Respondent argues here that compliance with the single employer subpoenas would be too burdensome, and that the documents sought are not "material to any matter in dispute." [Resp. Brf. at 28-29]. These are the same arguments already rejected by the district court. While Respondent acknowledges the pendency of the Third Circuit appeal, it vaguely contends that the "scope of review in the Third Circuit may be more limited than the breadth of the ALJ's error…" – but does not articulate the nature of the "breadth of the ALJ's error." [Resp. Brf. at 28, n.9] Nor does UPMC suggest any authority by which the Board could reverse or modify the ALJ's decision without simultaneously interfering with the Court of Appeals' review. Accordingly, this Exception must be denied.

III. Exception 4 must fail for lack of support.

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[11] In any event, the final decision by the Court of Appeals will represent the law of the case on this issue. *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 816 (1988) (decision on an issue made by a court at one stage of a case must be given effect in successive stages of the same litigation). The Board regularly applies the doctrine of law of the case in analogous circumstances between the same parties for the purposes of not reopening adjudicated questions of law. *See, e.g., Dynatron/Bondo Corp.*, 330 NLRB 16, 1 (1999); *Technology Service Solutions*, 332 NLRB 1096, 1096 fn. 3 (2000); *Transp. Serv. Co.*, 314 NLRB 458, 459 (1994).

UPMC takes exception to an evidentiary ruling by the ALJ, rejecting Respondent's reliance on comparator evidence occurring at another UPMC hospital in Erie, Pennsylvania. [Exception 4, ALJD 110: 38- 111:5].[12] Respondent introduced this evidence to meet its *Wright Line* burden concerning the discipline imposed on James Staus. The ALJ rejected the comparison as being too dissimilar since "Thompson did not work at Presbyterian Hospital," *id*., but noted that Respondent's reliance on such evidence from a different UPMC facility was inconsistent with its denial of single employer status. *Id*. at 110:37-41.

Respondent argues that the ALJ's reference to the single employer issue is "unsupported by law." [Exception 4]. Other than its unhappiness with the ALJ's logical observation, it offers no argument or authority in support of this Exception in its brief. Accordingly, this Exception must be denied.

IV. Respondent's Exception 5 must be denied because no remedy has yet been ordered against UPMC and the Exception is otherwise unsupported.

Respondent contends that "the ALJ's conclusions of law, order and proposed remedies are wholly without support in the law and on the record." [Resp. Brf. at 6-7; see also, Exception 5, contending that "preponderance of the evidence does not support any such remedies."]. Since no case on the merits against UPMC has yet occurred and no remedies have been ordered against UPMC, this Exception is not properly before the Board for consideration.

Second, to the extent that UPMC incorporated by reference the arguments made in Presbyterian Shadyside's Exceptions, the Union incorporates by reference its Answering Brief in Opposition to Presbyterian Shadyside's Exceptions and further adopts and incorporates by reference the arguments made in the Answering Brief filed by the General Counsel in Opposition

[12] Respondent claimed that discipline imposed on Theresa Thompson at Hamot Hospital in Erie was similar to discipline imposed on James Staus." ALJD 111: 1-5.

to Presbyterian Shadyside's Exceptions. The Board should accordingly reject the Respondent's attack on the remedies for all relevant reasons stated in these Answering Briefs.

Third, assuming *arguendo* that UPMC even has standing at this time to except to the remedies ordered against Presbyterian Shadyside, Exception 5 is unsupported because it is based on sections of the transcript that have no relationship to the issue of appropriate remedies, and in some instances, actually ***support*** the correctness of the ALJ's conclusions. [Exception 5]. Accordingly, Respondent's Exceptions must fail in the absence of any record support. *See,* Board Rules and Regulations §102.46(b)

For example, Tr. 1134:14-1135:6 refers to the testimony of Keith Lewis, a former UPMC supervisor who reported to manager Bart Wyss that supervisor Ted Hill had been using his cell phone while driving. The cited testimony supports the §8(a)(3) violations involving employee Al Turner, and shows that Respondent imposed disparate discipline on Turner for the same offense. The ALJ credited Lewis' testimony in support of his conclusion that Respondent violated §8(a)(3) in discharging Turner. [ALJD at 98-99].[13]

Similarly, Respondent's other record citations do not support the point that a "preponderance of evidence" was lacking. For example, Tr. 480:7- 481:14, Tr. 482-6-12, Tr. 482-17-21, and Tr. 483:4-15 include the testimony of Felicia Penn concerning the incident that led to her final written warning. The ALJ however, found that this portion of Penn's testimony was inconsistent with that of another witness called by Respondent, Aleasha Curtaccio, and he credited Curtaccio's testimony as "more reliable." [ALJD at 45]. Despite crediting Curtaccio, the

[13] The ALJ found that Lewis' testimony "was detailed and his demeanor reflected that he distinctly recalled the events that he testified about…On the other hand, Wyss testified regarding the issues in a somewhat perfunctory manner and without much detail. On balance, I find the testimony of Lewis is the more reliable version." ALJD at 99.

ALJ went on to find that "Respondent has not demonstrated that it would have taken the same action toward Penn in the absence of her protected union activity." [ALJD at 50-51].

Likewise, Respondent's other three transcript citations have no discernible connection to its "preponderance of evidence" argument. [Tr. 711, Tr. 978, and Tr. 1107].[14] Consequently, the transcript citations offered by Respondent do not support its "preponderance of evidence" Exception 5, which must therefore be denied.

CONCLUSION

Based on the foregoing arguments and authorities, and the arguments and authorities presented by the General Counsel in his Answering Brief in Opposition, the Board should deny Respondent UPMC's Exceptions.

[14] Tr. 711:24-712:1 (testimony of Shawn Matulevec, discussing filling "holes" in supply cabinets; Tr. 978:8-12 (testimony of Al Turner that he received discipline due to union support); and Tr. 1107:9-15 (testimony of J. Brown about adequate space in supply cabinets exceeding PAR requirements).

Dated: February 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Charging Party's Answering Brief in Opposition to UPMC's Exceptions in the above captioned case has been served by email on the following persons on this 20th day of February 2015:

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